

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

ALLEN G. GARNER)	
Claimant)	
VS.)	
)	Docket No. 236,896
STATE OF KANSAS)	
Respondent)	
AND)	
)	
STATE SELF-INSURANCE FUND)	
Insurance Fund)	

ORDER

Both claimant and respondent appealed the February 21, 2000 Award entered by Administrative Law Judge Nelsonna Potts Barnes. The Appeals Board heard oral argument in Wichita, Kansas, on June 9, 2000.

APPEARANCES

Curtis M. Irby of Wichita, Kansas, appeared for claimant. Jeffery R. Brewer of Wichita, Kansas, appeared for respondent and its insurance fund.

RECORD AND STIPULATIONS

The record considered by the Appeals Board and the parties' stipulations are listed in the Award. Additionally, at oral argument before the Appeals Board, counsel announced that claimant had passed away due to cancer on Wednesday, June 7, 2000.

ISSUES

This is a claim for an April 3, 1997 accident and alleged injuries to the left shoulder and neck. The Judge found that Dr. Pedro A. Murati was the only doctor to examine claimant's neck and, based upon Dr. Murati's opinions, determined that claimant injured both his left shoulder and neck in the April 1997 accident. After imputing a post-injury wage of \$280 per week, the Judge found that claimant had a 50 percent difference in pre- and post-injury earnings. Averaging the 50 percent wage loss with an 85 percent task loss, the Judge determined that claimant's permanent partial general disability was 67.5 percent.

Both claimant and respondent contend that Judge Barnes erred. Claimant argues the Judge erred by imputing a post-injury wage as his efforts were sufficient to establish a good faith effort in seeking appropriate employment. Conversely, respondent argues that the Judge should have limited claimant's award to a scheduled injury for an 11 percent functional impairment to the left shoulder.

The only issues before the Appeals Board on this review are:

1. Did claimant injure his neck, or his left shoulder only, working for respondent?
2. If claimant sustained a permanent injury to his neck, should a post-injury wage be imputed in determining the permanent partial general disability rating?

FINDINGS OF FACT

After reviewing the entire record, the Appeals Board finds:

1. On April 3, 1997, claimant injured his left shoulder when he reached across his body with his left hand and pulled on wire fencing material. The injury occurred while claimant was working for respondent's highway department.
2. Claimant saw numerous doctors for his injury, including a Hays, Kansas, orthopedic surgeon who diagnosed a left shoulder impingement and operated on claimant's left shoulder in June 1997. When his symptoms did not improve, claimant saw an orthopedic surgeon in Salina, Kansas, Dr. Fullen, for a second opinion. Dr. Fullen performed an arthrogram on claimant's left shoulder and told claimant that he had multiple tears in his rotator cuff. Dr. Fullen also diagnosed reflex sympathetic dystrophy (RSD). After seeing at least two other doctors, who did not agree with the RSD diagnosis, claimant then came under the treatment of another Salina orthopedic surgeon, Dr. Milo Sloo, III.
3. Dr. Sloo first saw claimant on November 17, 1997. Approximately one month later, the doctor performed an arthroscopic excision of a labral tear and an open acromioplasty on claimant's left shoulder. But claimant's shoulder symptoms did not improve. In late March 1998 Dr. Sloo released claimant with a 20-pound lifting restriction and a restriction against working overhead with the left arm.
4. At his attorney's request, claimant was evaluated by Dr. Pedro A. Murati, a physician who specializes in physical medicine and rehabilitation. Dr. Murati saw claimant once in August 1998 and once in October 1998 and diagnosed: (1) status post open acromioplasty and ligament resection on June 26, 1997, (2) status post arthroscopy of left shoulder with excision of labral tear and open acromioplasty of the left shoulder on December 16, 1997, (3) probable left carpal tunnel syndrome, (4) cervical strain with myofascial pain syndrome, and (5) possible reflex sympathetic dystrophy of the left upper extremity. In rating claimant's functional impairment, Dr. Murati determined that claimant had a 27.5 percent functional

impairment to the left upper extremity and a four percent whole body functional impairment due to the neck.

5. Before Dr. Murati's evaluation, there was little, if any, medical opinion that claimant had also injured his neck in the April 1997 accident. Recognizing that an independent medical evaluation was appropriate, the parties agreed that Dr. Philip R. Mills, a board-certified physical medicine and rehabilitation physician, should conduct that examination. The Judge then issued the order for Dr. Mills to conduct an independent medical evaluation.

6. Pursuant to the Judge's order, Dr. Mills examined claimant in June 1999 and diagnosed (1) left shoulder impingement syndrome with anterior labral tear and shoulder synovitis, (2) myofascial pain syndrome in the trapezius and shoulder girdle region, and (3) status post open acromioplasty and ligament resection with arthroscopy of the left shoulder with excision of the labral tear. Based upon the examination and a review of claimant's medical records, including the electroneurodiagnostic studies created by Dr. Murati, Dr. Mills did not find any impairment in claimant's neck. Using the fourth edition of the *AMA Guides to the Evaluation of Permanent Impairment*, Dr. Mills rated claimant as having a 20 percent functional impairment to the left upper extremity.

7. The Appeals Board finds that Dr. Mills examined and evaluated claimant for a possible neck injury. The Appeals Board is persuaded by Dr. Mills' opinion that claimant's injuries are limited to the left shoulder. It appears that only Dr. Murati believes that claimant's neck was somehow injured in the April 1997 accident. But not even Dr. Murati offers an explanation of how claimant would have injured his neck by pulling a wire across his chest. The Appeals Board is persuaded by the opinions of Dr. Mills, who testified as an unbiased expert witness. Therefore, the Appeals Board concludes that claimant has sustained a 20 percent functional impairment to the left upper extremity as a result of the April 1997 accident.

CONCLUSIONS OF LAW

1. The Award should be modified to award claimant permanent partial disability benefits for a scheduled injury for a 20 percent functional impairment to the left upper extremity.

2. The Workers Compensation Act provides that a worker is entitled to receive a maximum of 225 weeks of permanent partial disability benefits for a shoulder injury.¹ As provided by regulation,² the number of weeks of temporary total disability benefits that are due (59.72) is subtracted from 225 and the resulting number is then multiplied by the functional impairment rating (20 percent). That computation yields 33.06 weeks of permanent partial disability compensation that claimant is entitled to receive in this claim.

¹ K.S.A. 44-510d(a)(13).

² K.A.R. 51-7-8.

3. Because claimant did not injure his neck in the April 1997 accident, the Appeals Board does not reach the issue of whether a post-injury wage should be imputed. Claimant's permanent partial disability benefits are limited to those of a scheduled injury, which does not take into account a worker's post-injury wage.

AWARD

WHEREFORE, the Appeals Board modifies the February 21, 2000 Award entered by Judge Barnes and awards claimant permanent partial disability benefits for a 20 percent functional impairment to the left upper extremity at the shoulder level.

Allen G. Garner is granted compensation from the State of Kansas and its insurance fund for an April 3, 1997 accident and resulting disability. Mr. Garner is entitled to receive 59.72 weeks of temporary total disability benefits, based upon an average weekly wage of \$485.98, at \$324 per week, or \$19,349.28, plus 33.06 weeks of permanent partial disability benefits, based upon an average weekly wage of \$560.63, at \$338 per week, or \$11,174.28, for a 20 percent permanent partial disability, making a total award of \$30,523.56, which is ordered paid in one lump sum less any amounts previously paid.

The Appeals Board adopts the remaining orders set forth in the Award to the extent they are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of June 2000.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Curtis M. Irby, Wichita, KS
Jeffery R. Brewer, Wichita, KS
Nelsonna Potts Barnes, Administrative Law Judge
Philip S. Harness, Director